

**SYMPOSIUM ON INTELLECTUAL
PROPERTY
AND COMPETITION POLICY
Geneva, May 11, 2010**



**Intellectual Property and
Competition Policy**

WIPO Secretariat

“It is clearly better that property should be private, but the use of it common; and the special business of the law maker is to create in men this benevolent disposition.”

Aristotle, Politics (translated by Benjamin Jowett)

Summary:

1. Is IP against competition?



2. How do IP and competition (antitrust) law interact?

An aerial photograph of Lake Geneva (Leman lake) in Switzerland. The lake is a deep blue color, occupying the lower half of the frame. To the right, a city with dense buildings and some industrial structures is visible along the shore. In the background, there are rolling hills and mountains, some with patches of snow, under a clear, light blue sky. The overall scene is bright and clear.

1. Is IP against competition?

The idea that IP inherently trumps on competition results from a largely spread reductionist view of its real nature, function and scope.

Here are a few examples of that reductionist view:

- **IP: "Certain creations of the human mind that are given the legal aspects of a property right." (J. Thomas McCarthy et alii, McCarthy's Desk Encyclopedia of Intellectual Property, 308 (3rd ed., BNA, 2004)).**
- **IP: "Ownership of a stake in the economic value of an idea, such as trademarks or patents. Innovation is encouraged by strong intellectual property laws, as they provide innovators with a means to earn money by allowing a temporary monopoly." (Matthew Bishop, Economics – An A-Z Guide, at 172-3 (The Economist, London, 2009))**
- **"Intellectual property provides innovators with temporary monopoly power. Monopoly power always results in an economic inefficiency. There is accordingly a high cost of granting even temporarily monopoly power, but the benefit is that by doing so, greater motivation is provided for inventive activity." (Joseph E. Stiglitz and Andrew Charlton, Fair Trade for All – How Trade Can Promote Development, at 141 (Oxford Univ. Press, NY, 2005))**

These quotes express the view that IP is a necessary evil that society pays in order to promote invention and creation.

... Is it?

Now, think of the following:

A man establishes, at Evian, a French city on the south shore of Lake Léman, close to the French Alps, a business of extracting, bottling and distributing mineral water that comes from the Alps.

He sells the water under the brand "Evian."



For the last 2,000 years wine producers have produced a sweet wine from grapes that grow on the shores of Douro River. In the 2nd half of 17th century it became worldwide known as Port wine, after the name of the city (Porto) through which it is exported.

An employee of a multi brand car dealer organizes a list of those suppliers who have made available good quality cars to his company in the last five years.

The list contains suppliers' names, their phone numbers and e-mail addresses, and is organized in alphabetical order.



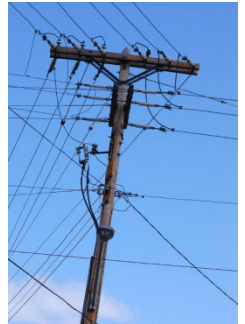
That employee saves that list on a computer and protects it with a password.

Now I ask: where is the creativity or inventiveness in naming mineral water extracted and bottled in the city of Evian with the word “Evian”? Where is the incentive to invent in protecting the expression “Port wine” which names a wine that has been the same for 2,000 years? And where is the invention or creation in typing a list of trusted suppliers?

Nevertheless, the terms Evian and Port wine, as well as that list of suppliers, are intellectual property subject matter!...



Or, to those who agree that IP protects ideas or their expressions, one might ask: so why aren't telephone directories protected? They represent ideas: from the fundamental idea of listing the names of users in alphabetical order to the idea of advertising goods and services on yellow pages. Behind the directory there is the telephone as well as the service of telecommunications. When we hold a telephone directory in our hands we hold actually the expression of thousands of ideas. **Yet, the telephone directory is NOT IP subject matter...**



Yellow Pages



Therefore, it is not true that IP only protects inventions and creations of the human mind. It may protect them, yes, but IP is much more than that: it also protects those distinctive signs and that list of suppliers. On the other hand, IP may protect ideas and their expressions, but it does not protect them all.

Then, what is intellectual property?

What is the element that is common to literary works, to inventions, to names of places or of people, to designs, to lists of suppliers, etc, under the same legal branch? And what is the element that is missing in ideas such as telephone directories?

That common element that binds together all aspects of intellectual property (and that is missing in certain ideas, such as telephone directories) is the **differentiating function (and capacity) of the intangible assets that are its subject matter.**

Differentiating intangible assets may be of many types. Actually we stumble with them in every walk of life, at any moment, without paying attention. We got used to the idea that IP is about Apple and Microsoft and Intel.

But the truth is that IP is at the core of the organization of societies. It is an essential tool both for the humble artisan who transforms raw materials extracted from his environment, such as leaves of grass or coloured sand, to the employee of a huge corporation that builds the rockets that aim at the stars. It protects both the brand of the global maker of soft drinks or the fast food chain and the reputation of the shopkeeper who strives to survive in the competitive environment of a souk or a bazaar in a remote village of a poor country.

Just take a retailer who has a shop in the Muttrah souk, at Muscat, Oman. He sells pashminas (wool scarves) which are of better quality than those found in the neighbouring stalls. That retailer buys his pashminas from a specific supplier, an old acquaintance who has a network of contacts with the best pashmina manufacturers in Kashmir. That piece of information – knowledge of a specific supplier – is valuable because it permits its holder to sell goods to which his competitors do not have access.

That piece of knowledge, while kept secret, is a differentiating intangible asset: it is IP subject matter.

Those who are interested in pearls and visit Manila should go to the Greenhills shopping center. There you will find perhaps the largest pearl market on Earth: a true maze with hundreds of shops selling pearls of all varieties and prices. You will spend hours until you decide what to buy. Probably you will not take that decision immediately: you will memorize an element that next day will permit you to come back to the same shop (for example, its address in the maze: the number 64). Next day you do not need to search any further: you will come directly to stall nr. 64.

64 is a differentiating asset of that shop: 64 is IP subject matter.

IP is important for the merchants and manufacturers but it is also essential for us, consumers. Without a legal system to ensure differentiation, how could we perform tasks that we take for granted such as going to a store and select among different MP3 players? IP will ensure that the differences among the available MP3 will be maintained: patents and utility models will differentiate the technical features and functionalities of each device; designs will keep distinct appearances; distinctive signs (trademarks, trade names, slogans) will permit us to associate a given reputation to each one of the models available.

IP differentiates and therefore it is in the core of competition (rivalry) between businesses, be they multinational companies listed in the New York Stock Exchange or modest merchants in Muscat souk or in the Manila mall.

(this explains why, in IP law, notions such as novelty, inventiveness, distinctiveness, creativity, originality, priority are so essential and recurrent: they all are expressions of differentiation; the same goes for secrecy: one can only keep secret what others do not know; the subject matter of secrecy therefore must be different from what others know.)

In conclusion, IP is inherently *pro-competition*. Without IP there is no differentiation. And without differentiation there is no competition.

However, IP is inherently pro-competitive only **when it comes in the right dosage.**

Too less IP is not sufficient to promote differentiation: too less IP gives rise to confusion.*


*** Lack of adequate IP protection results in generalized imitation of market leading companies and products by less efficient competitors; the same happens when the levels of enforcement are insufficient.**

But too much IP does not differentiate either. **Actually, too much IP is indeed less IP because it also reduces differentiation.***

*** Protecting generic names as trademarks leads to monopsonies or monopolies [see the cupuaçu case]; patenting properties of nature generates monopolies [see the case of gene patents]; protecting functionalities as distinctive signs appropriates technical features and may foreclose markets for ever [see the Lego case; see the attempted registration of the Harley Davidson engine sound as a trademark]; protecting lists of service subscribers' names or of TV programmes generate monopolies in the publishing business [see Feist and Magill].**

In conclusion, societies, for the sake of their economic freedom, have to find the right dosage for their IP. IP in wrong dosages is anti-competitive in itself and thus runs counter its own objectives.*

*** I am sorry to inform you that there is no miraculous solution for this. The right dosage can only be found through trial and error, in the course of years, if not decades. Societies need to experiment. Legal tools should be allowed to be tested by natural selection.**



2. How do IP and competition (antitrust) law interact?

IP becomes anti-competitive when

- it comes in wrong dosages;

or

- it comes in the right dosage but it is abused or misused in a way that affects competition.

**Intellectual property and competition
(antitrust) law interoperate on two
levels:**

On the first level

Intellectual property needs competition law

(IP differentiates competitors; if competitors start operating (i.e., abusing) IP in a manner that eliminates competition or rivalry, the result is the suppression of the need for differentiation and, thus, of IP; abusive IP has in it the seed for self-destruction. Thus, competition law is needed to ensure that IP keeps differentiating. Otherwise, national IP offices could be shut down.)

On the second level

Competition law needs intellectual property

(IP ensures that firms have the tools to differentiate themselves and their products from their rivals; without such guaranty, differences would simply vanish: competitors would be very similar, their products or services would be indistinguishable, and consumers would be at a complete loss; rivalry would disappear. As a result, if IP were eliminated, national competition agencies could be shut down).

This means that IP and competition law are intertwined components of competition policy – one should not go without the other.



Thank you.

**If you have questions, please do not hesitate
to address them to**

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